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April 28, 1998

The Honorable Lewis Hall Griffith  
The Honorable Jeffrey S. Gulin  
The Honorable Edward Dreyfus  
c/o Ms. Gina Giuffreda  
Office of the Register of Copyrights  
Room LM-403  
James Madison Memorial Building  
101 Independence Avenue, S.E.  
Washington, D.C. 20540

GENERAL COUNSEL  
OF COPYRIGHT

APR 28 1998

RECEIVED

Re: Noncommercial Educational Broadcasting  
License, Docket No. 96-6 CARP NCBRA

Dear Judges Griffith, Gulin and Dreyfus:

The American Society of Composers, Authors and Publishers (ASCAP) hereby responds to the Panel's Order dated April 8, 1998. Pursuant to the Order, the Panel directed Public Broadcasters to submit a copy of their voluntary license agreement with SESAC by April 29, 1998, with responses by the performing rights organizations to be filed on the same day. In lieu of submitting a copy of the SESAC agreement, Public Broadcasters were ordered to show cause why they could or should not be required to do so.

ASCAP has no objection to the Panel requesting Public Broadcasters to supplement the record with this additional material. However, the Panel's Order raises a number of important concerns to ASCAP regarding the submission of that evidence.

First, ASCAP must file a reply to the Order simultaneously with Public Broadcasters' production of the SESAC agreement, or other reply to the Panel's Order. It is impossible for ASCAP to file a true "reply" to Public Broadcasters' filing of the SESAC agreement or other response to the Panel's Order before receiving a copy of Public Broadcasters' submission. Therefore, ASCAP's submission to the Panel now is hampered by the fact that ASCAP may not be able to address fully any potential issues relating to the SESAC agreement that may affect ASCAP's position in this proceeding and thus be of importance to ASCAP's members.

Second, ASCAP is uncertain from the Panel's Order how the Panel intends to evaluate such evidence. As the Panel knows, ASCAP's approach to the determination of fees to be set in this proceeding differs from the approaches of Public Broadcasters and BMI. Indeed, ASCAP believes that both the statutory history of Section 118 and CRT precedent require this Panel to make a separate determination of an appropriate ASCAP fee -- a fee separate and apart from any fee set for any other performing rights organization. (Even the rate court determinations upon which Public Broadcasters rely for their argument that the Panel should look to the prior license agreements between ASCAP and Public Broadcasters have set separate rates for the use of works in the ASCAP repertory. And, by insisting upon the establishment of a separate rate court for itself, BMI, too, has acknowledged that it did not want its license fees determined in tandem with or by the same judge setting the ASCAP license fees.)

Moreover, if Public Broadcasters do produce a copy of the SESAC agreement, that production will occur in the midst of rebuttal testimony and only shortly before the Panel closes the record and parties begin preparing their findings of fact and conclusions of law. As such, and pursuant to the Panel's Order, there will be no sponsoring witness for the SESAC agreement and ASCAP will be unable to conduct appropriate cross-examination.

In short, ASCAP is concerned that, without further modification of the Panel's Order, ASCAP will not be given the opportunity to test the relevance or weight to be given such an agreement. This is most important because the Panel's Order states that "the SESAC rate is potentially critical to the Panel's ultimate determination of rates." And, the Panel has

already ruled in this proceeding that production of additional evidence may be appropriate when the Panel believes that certain evidence is "potentially 'critical to the resolution of the proceeding.'" See Order of the Panel dated April 6, 1998.

Yet, there is next to no evidence in the record (and under the Panel's current scheduling order no opportunity to introduce additional evidence) about SESAC, its repertory or membership, or evidence placing any such rate in its proper context. For the Panel's information, SESAC is but a tiny competitor to ASCAP, with a mere fraction of repertory the size or quality of ASCAP's. SESAC's repertory is narrowly concentrated in the gospel and country music fields, with a handful of works from other musical genres. In addition, SESAC represents in this country little, if any, works contained in the repertories of foreign performing rights societies.

For the foregoing reasons, ASCAP respectfully requests that, if Public Broadcasters produce a copy of the SESAC agreement, ASCAP be given an opportunity to supplement the record with additional written rebuttal testimony in response thereto. In that instance, ASCAP would be prepared to submit such written testimony on an expedited basis and within a short time after the close of rebuttal cases, thereby resulting in no need to alter or otherwise extend the current scheduling order in this proceeding. Further supplementation of the record also will add to the Panel's understanding of the issues in this proceeding and further the Panel's duty, under Rule 251.46(d), to develop the administrative record adequately.

Finally, the CARP rules and recent CARP precedent permit the Panel to supplement the record with written only rebuttal statements. See 37 C.F.R. § 251.42 (Panel may suspend or waive rules for good cause shown); 37 C.F.R. § 251.46(d) (Panel may call upon parties for production of additional evidence "at any time"); Determination of the Distribution of the 1991 Cable Royalties in the Music Claimants Category, Docket No. 94-3 CARP Cd 90-92, 62 Fed. Reg. 51162 (9/25/97) (for good cause shown, CARP waived oral hearings and decided to proceed on written record alone; among other things, parties ordered to supplement written direct cases with written rebuttal cases); Order, In the Matter of Distribution of DART Royalty Funds for 1992, 1993 and 1994, Docket No. 95-1 CARP DD 92-94, at 1-3 (Oct. 4, 1996) (CARP

determined, upon basis of good cause shown, to waive oral hearings and proceed on written record alone).

Respectfully submitted,

  
Philip H. Schaeffer, Esq.

J. Christopher Shore, Esq.

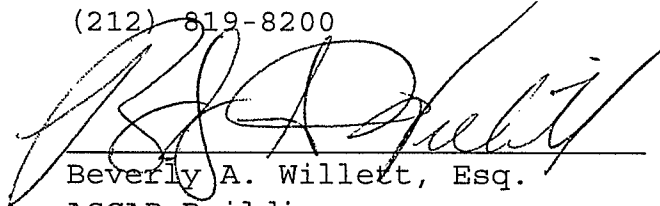
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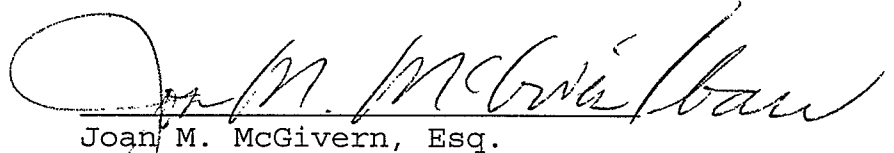
  
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United States Copyright Office  
Copyright Arbitration Royalty Panel  
Washington, D.C. 20024

-----X  
In the Matter of )  
 ) Docket No. 96-6 CARP  
ADJUSTMENT OF THE RATES FOR ) NCBRA  
NONCOMMERCIAL EDUCATIONAL )  
BROADCASTING COMPULSORY LICENSE )  
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CERTIFICATE OF SERVICE

I am counsel to the American Society of Composers,  
Authors and Publishers. On April 29, 1998, I caused to be served  
true copies of the letter dated April 29, 1998, as follows:

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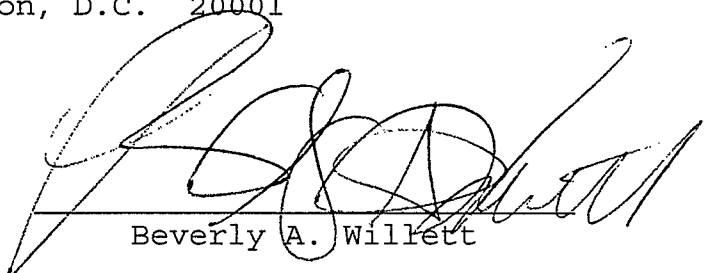
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